



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal 421 of 2002

DISMAS OMONDI AYOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Dismas Omondi Ayoo, the appellant, was charged in the Senior Resident Magistrate's Court at Kilifi with five (5) counts of robbery with violence contrary to section 296 (2) of the Penal Code. He pleaded not guilty. At the close of the prosecution case, the Learned Senior Resident Magistrate (P.M. Ndung'u) found that a prima facie case had been made out against the appellant and placed him on his defence. After his defence the Learned Senior Resident Magistrate in a considered judgment dated 28th January, 1999, found the appellant guilty as charged and convicted him of the said offence. He was then sentenced to death. He was not satisfied with that decision and has appealed before us against both conviction and sentence.

The particulars of the charge were as follows:-

Count One:

The appellant on the 30th May, 1998 at around 2.00 a.m. within Mtwapa market in Kilifi District of Coast Province, jointly with others not before the court robbed PJ M of her cash Kshs. 200/= and at or immediately before or immediately after such robbery threatened to kill the said PME while armed with pangas, slashers, knives and rungun.

Count Two:

The appellant on the 30th May, 1998, at Mtwapa market within Mtwapa Location in Kilifi District of Coast Province, jointly with others not before the court robbed LAB of his cash Kshs. 590/= and one wrist watch make Seiko 5 valued at Kshs. 2,500/= and at or immediately before or immediately after such robbery threatened to kill the said Laban Arnold Buluma while armed with pangas, slashers, knives and rungun.

Count Three:

The appellant on 30th May, 1998, at Mtwapa market within Kilifi District of Coast Province, jointly with others not before the court robbed AK of his cash Kshs. 90/= and two wrist watches make Citizen valued at Kshs. 900/= and at or immediately before or immediately after the time of such robbery wounded the said Amraphael Kifuso while armed with pangas, slashers, knives and rungun.

Count Four:

The appellant on the 30th May, 1998, at Mtwapa market within Mtwapa Location in Kilifi District of Coast Province, jointly with others not before the court robbed RAO of her cash Kshs. 120/= and at or immediately before or immediately after the time of such robbery threatened to kill the said Risper Achieng Otii while armed with pangas, slashers, knives and rungun.

Count Five:

The appellant on 30th May, 1998, at Mtwapa market within Mtwapa Location in Kilifi District of Coast Province jointly with others not before the court robbed Peter Mwangombe of his cash Kshs. 900/= and two wrist watches make Seiko 5 valued Kshs. 4,000/= and at or immediately before or immediately after the time of such robbery wounded the said Peter Mwangombe while armed with pangas, slashers, knives and rungun.

In his amended grounds of appeal, the appellant raises the following issues: - unsatisfactory identification; insufficient and contradictory evidence; defective charge and failure by the trial magistrate to consider his defence.

During the hearing of the appeal, the appellant was represented by Mr. Obara who argued only two grounds namely, unsatisfactory identification and defective charge. In his oral submission before us, counsel argued that the conditions on the material night of the robbery were not conducive for a positive identification and that the complainant in count three was not called as a witness.

Mr. Ondari, Learned Assistant Director of Public Prosecutions conceded the appeal on the ground that the identification of the appellant was not positive and that the circumstances surrounding the arrest of the appellant were suspect.

As the first appellate court, it is our duty to re-examine and re-evaluate the evidence upon which the appellant was convicted and reach our own independent conclusion bearing in mind that we neither saw nor heard the witnesses testify and should give allowance for that (See **Okeno – v – Republic [1972] EA 32**).

The facts giving rise to the charge against the appellant were briefly as follows:- The complainants, PJM (PW 1), LAB(PW 2), R A O(PW 3), PMN(PW 5) and R K (PW 6) were, on the material night, attacked by thugs who were armed with pangas, slashers, knives and rungas. In the attack they each lost various sums between Kshs. 90/= and 900/=. Some of them also lost watches. PW 1, PW 5 and PW 6, could not identify any of the robbers. PW 2, LAB testified that he identified the appellant aided by light from a torch held by one of his (appellant's) colleagues. PW 3, Risper Achieng Oti, testified that she identified the appellant using light from a kerosene lamp and later saw him dancing in a bar when she alerted PW 7, IP Daniel Irungu Maina, who later arranged the arrest of the appellant.

In his unsworn statement, the appellant testified that while enjoying himself at Garden Bar in Mtwapa, he was hit by a woman who was drunk and was in the company of a police officer. He did not respond but later the same night, he was arrested and charged for an offence he did not commit. He however related an outstanding land dispute between his father and the police department which led to his being framed for this offence.

On the above facts, the Learned Senior Resident Magistrate found that the offences of robbery with violence had been proved against the appellant as required in law and convicted him as already stated. In convicting the appellant, the Learned Senior Resident Magistrate found that PW 2 and PW 3 identified the appellant positively. In his own words:-

“The court upon evaluation of the evidence of these two witnesses found their evidence credible and accept (sic) them as witnesses of truth. The two were able to see and identify the accused as having been among the robbers who robbed them.....”

We have re-evaluated the same testimony and note that the robbery was indeed staged at about 1.00 a.m. PW 2, Laban Arnold Buluma, testified that there was no light in his house when the robbers struck. He was able to see the robbers with the aid of reflection of torch light flashed at money placed on a bed during the robbery. One of the robbers later demanded for PW 2's watch and PW 2 then recognized him as a person he used to see in the area. In our view torch light reflected by money placed on a bed would not have been sufficient for positive identification of any of the robbers. The purported identification was further weakened by the fact that the entire incident took not more than five minutes when PW 2 was in a state of shock. It is, in the premises, possible that he could be wrong about the true identity of the person he saw. In any event, it was not on his description that the appellant was arrested. Indeed the police officer to whom he described the robbers did not testify before the Learned Senior Resident Magistrate.

PW 3, Risper Achieng Oti, on the other hand was first attacked at around 2.00 a.m. on the material night. She did not identify any of the thugs in that attack. Later, PW 3 was again attacked by thugs. One of the thugs wanted to rape her but was restrained by his colleague. The gang then left. Later, a lone thug returned to PW 3's house, carried out a search and left. PW 3 testified that she marked the appellant who she identified using light from a kerosene lamp. She claimed to have subsequently identified the appellant at a club where she had gone to relax.

We observe that, PW 3 had not known the appellant prior to the robbery. In her entire testimony, she did not say how long she observed the robbers. She also did not testify that she gave a description of the appellant to the police when she first reported the robbery. The purported identification at the club could not be positive. We say so because, the same took place nearly two months after the robbery and at a joint where both PW 3 and the appellant were enjoying evening drinks. Again, the police officer to whom PW 3 made the first report did not testify to confirm that indeed PW 3 had described the appellant in her first report. Further, no identification parade was held in respect of the appellant. In the absence of such an identification parade, we are of the view that the evidence of identification by PW 3 was weak and should not have been relied upon for the conviction of the appellant. We are therefore not surprised that Mr. Ondari, the Learned Assistant Deputy Public Prosecutor did not support the conviction of the appellant.

Before concluding this judgment, we observe that the Leaned Senior Resident Magistrate sentenced the appellant to suffer death on all the counts. With respect that was not proper since a person cannot be hanged more than once. Only one sentence of death should be imposed on conviction and where there is a plurality of counts, the sentences on other counts should be held in abeyance.

The upshot is that this appeal succeeds. The appellant's conviction is quashed and the sentence of death imposed upon him set aside. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF JUNE 2010.

F. AZANGALALA
JUDGE

M. ODERO
JUDGE

Read in the presence of:-

Mr. Lijodi holding brief for Ms. Mbogo for the Appellant and Mr. Onserio for the Republic.

F. AZANGALALA
JUDGE
8TH JUNE 2010